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No. 84-6646

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE LLOYD TURNER,
Petitioner,

v.

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. PETITIONER'S RIGHT TO EXCLUDE RACIALLY PREJUDICED PEOPLE FROM HIS JURY CAN ONLY HAVE MEANING IF HE HAS A RIGHT TO LEARN WHO THOSE PEOPLE ARE.

Petitioner has argued that the real question presented here is whether he has a right to know if any member of his jury panel believes that the fact that he killed a white man makes him more deserving of death than if the murder had been committed by a white man. Respondent concedes that Willie Turner had such a right:

> Petitioner asks whether he had a right to know if racially biased individuals were on his jury. Not only Petitioner, but all defendants, are guaranteed this right. The *voir dire* conducted in this case was sufficient to address this issue and was consistent with the *voir dire* approved by this Court in *Ristaino*.

Brief of Respondent 31. Having conceded that such a right exists, the next question is whether there is *anything* in the *voir dire* that was conducted that even begins to suggest to a potential juror that his racial biases may be brought into play.

According to court records, the typical juror in this case would have been a 54-year-old woman.[1] She could see that Willie Turner is black, but she did not know Jack Smith, the man who was killed, and she had no idea of Smith's race. She grew up in the Jim Crow South, and it is a fairly safe bet that only those three jurors under 30 attended integrated schools.

Judge Godwin asked each juror the same questions:

1. Are you related by blood or marriage to either of the attorneys in this case, to the defendant or to the alleged victims, either Alan Bain or W. Jack Smith, Jr.?

2. Do you know anything about this case?

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[1] The median age was 53.5, and eight of the twelve jurors were women.

3. Are you related by blood or marriage to any person who is employed as a police officer or any other law enforcement agency?

4. Have you or any members of your family been a victim of any crime?

5. Do you have any religious or conscientious scruples or objections against the imposition of a sentence of death?

6. Do you know any reason whatsoever why you cannot render a fair and impartial verdict in these cases, either for the defendant or for the Commonwealth of Virginia?

7. Do any of you know any reason whatsoever why you should not sit as a member of the jury in this case?

App. 16-17.

Was there anything in those questions that should have told our typical juror that Jack Smith was white? Was there anything in those questions that should hve told her that she was being asked if she thought a black who killed a white should be sentenced to death?

Respondent claims that the above questions (except for the death-qualifying question, all of them are required to be asked of all jurors in every criminal case in the Commonwealth) were adequate to guarantee to Willie Turner the right to know if his venire included people who believed that blacks who have killed whites should be executed. Brief of Respondent at 14. Respondent suggests that because the jurors knew that Turner was black, all of the jurors were on notice to ponder whether they believed that the death penalty was particularly appropriate if Willie Turner had killed a white man. Brief of Respondent at 13. Respondent apparently imagines that the jurors, having been asked about whether they knew of any reason that they could not be impartial, would look at Willie Turner, and would then say to the judge, "No, but if Jack Smith turns out to be white, I will vote to execute him."

Jurors can only answer the question that is asked of them. They cannot be expected to speculate about the facts of the case before they exclude all possible theories of bias or prejudice. The only way to be sure that jurors disclose their biases or prejudices is to ask them.

Nothing in the *voir dire* in this case guarantees Petitioner his conceded "right to know if racially biased individuals were on his jury." Brief of Respondent 31.

II. THIS COURT NEED NOT OVERRULE *RISTAINO* v. *ROSS*, 424 U.S. 589 (1976), TO RULE IN PETITIONER'S FAVOR.

In considering this case, this Court must either overrule, distinguish, or apply *Ristaino* v. *Ross*, 424 U.S. 589 (1976). Regardless of how this Court compares this case and *Ristaino* v. *Ross*, this Court should rule in Petitioner's favor.

Throughout his brief, Respondent has attemped to suggest that Petitioner cannot prevail unless this Court overrules *Ristaino* v. *Ross*. That is simply not true. We have suggested a number of ways that *Ristaino* v. *Ross* might be distinguished, and the ten factors cited in our Opening Brief are all factors to consider in applying *Ristaino's* case-by-case analysis. Obviously, if this Court were to overrule *Ristaino* v. *Ross*, Petitioner would be delighted. But we have not asked this Court to do so, because this Court need *not* do so to find in Petitioner's favor.

A. Though It Need Not Do So To Rule In Petitioner's Favor, This Court Could Establish A Per Se Rule In Capital Cases.

1. This Court has recognized that capital cases are different procedurally.

The linchpin of this Court's Eighth Amendment jurisprudence since *Furman* v. *Georgia*, 408 U.S. 238 (1972), has been that "death is different."

> We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.

Lockett v. *Ohio*, 438 U.S. 586, 604 (1978), quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). In *Strickland* v. *Washington*, ___ U.S. ___, 104 S.Ct. 2052 (1984), this Court recognized that the standard of competency of counsel is contextual (*see also McMann* v. *Richardson*, 397 U.S. 759, 770-771 (1970)), and therefore that counsel may be required to do in a capital case what he would not be required to do in a non-capital case. Although the standard for counsel's effectiveness does not differ from case to case, how that standard is applied in a particular case will depend in part upon the nature of the proceeding and the punishment at stake.[2]

The standard of effective assistance—the "reasonable range of competence" test—still applies in capital cases, but the actions necessary to satisfy that standard will differ, depending, in large part, upon the punishment at stake. Similarly, the standard under the Sixth Amendment is the same, whether the case is a capital case or a larceny case—all defendants are entitled to a trial "by an impartial jury"—but the actions that may be necessary to obtain that impartial jury will differ from case to case.

The guarantee of an impartial jury includes the guarantee of a jury composed of twelve people who can follow the instructions of the trial judge. That guarantee attaches in both capital and non-capital cases, and the legal standard is the same in all cases. In jury-sentencing states such as Virginia, a jury may sentence a grand larceny defendant to any sentence from one

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[2] In *Powell* v. *Alabama*, 287 U.S. 45 (1932), this Court extended the right of counsel to defendants charged with capital crimes some thirty-one years before that same right was extended to all felony defendants in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and ultimately to misdemeanants in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972).

day in jail to twenty years in the penitentiary, *Va. Code Ann.* § 18.2-95 (1950), but no authority requires *voir dire* to allow the Commonwealth to strike any juror who says that he cannot impose the maximum sentence. But in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), this Court approved *voir dire* to allow the Commonwealth to strike any juror who stated that he could not impose a death sentence.[3]

All that we ask here is that this Court recognize that, just as a capital case imposes certain burdens upon *counsel* that may not be relevant in a larceny case, the unique characteristics of a capital case impose certain burdens upon the trial *judge* that might not be relevant in a non-capital case.

2. The decision to impose the death sentence is not an objective decision.

Ristaino v. *Ross* involved a jury whose only duty was to determine guilt or innocence, a decision that is susceptible of some degree of objective analysis. The decision whether to impose the death sentence is not such an objective decision. The effect of this Court's holding in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), is that juries must always be left free to engage in jury nullification,[4] and that the defense has a right not only to argue for jury nullification, but also to have an instruction to the jury legitimizing it. The Virginia Supreme Court has acknowledged that a capital jury may impose a life sentence for any reason at all, or for no reason at all. *Smith* v. *Commonwealth*, 219 Va. 455, 480, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979), *cert. granted on other issues sub nom. Smith* v. *Sielaff* (No. 85-5487) (October 21, 1985).

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[3] The Defendant is also entitled to use *voir dire* to learn if there is any juror who believes that death is the only appropriate punishment. *Patterson* v. *Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981).

[4] By "jury nullification" we mean that the jury may render a verdict in favor of the defendant for reasons not based on law or fact, but rather on emotion or sympathy for the defendant.

If the jury is going to be given that discretion, and if it is fairly predictable that a significant number of potential jurors may harbor prejudices which may raise questions about how they are to make the decision required of them, it makes sense to require that the jurors be questioned about such prejudices.

3. A rule requiring *voir dire* on racial prejudice does not require *voir dire* on other kinds of prejudice.

Respondent's real objection is that racial prejudice does not differ in any meaningful way from any other kind of prejudice—prejudice on account of religion, gender, or, perhaps, facial hair (*see Ham* v. *South Carolina*, 409 U.S. 524 (1973))—and therefore a *per se* rule requiring racial *voir dire* is the first step on the road to chaos.

> The adoption of a rule based solely upon a perspective of historical discrimination could not be limited to race but would apply with equal force to questioning about religious affiliation, ethnic origin, sex or national origin.

Brief of Respondent 14.

Respondent suggests, in essence, that the historical discrimination against blacks in this country is equivalent to the historical determination in this country based on religious affiliation, ethnic origin, sex or national origin. This is manifestly not so. This nation fought a civil war, in large part over the question of whether blacks should be enslaved. The Thirteenth, Fourteenth and Fifteenth Amendments to the United States were passed to end that "historical discrimination." More recently, seven members of this Court, including the dissenters, explicitly recognized in *Furman* v. *Georgia*, 408 U.S. 238 (1972), that the death penalty had historically been applied in a racially discriminatory fashion. Although discrimination on the basis of sex and religious affiliation is certainly to be condemned, it has never been practiced with the virulence and consistent malice with which racial discrimination has been practiced in this country. Though Jews, Catholics, Italians, Chinese, and other minorities have been discriminated against,

they have not been enslaved. Prejudice against them has not provoked lynchings and race riots.[5]

Respondent relies heavily upon this Court's footnote in *Ristaino* v. *Ross*,:

> In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion. See *Connors* v. *United States*, 158 U.S. 408, 415 (1895).

428 U.S. at 596 n.8, cited at Brief of Respondent 14. Petitioner respectfully suggests that this approach ignores the unpleasant reality that justice in the hands of a capital sentencing jury often *may*, without compensating procedural protections, turn in part "upon the pigmentation of skin." The whole purpose of the *voir dire* that we seek is to make sure that justice *does not* "turn upon the pigmentation of skin."

This Court recognized in 1972 that the death penalty statutes across the country had been applied in a racially discriminatory fashion. This case came to trial only seven years later. The demonstrations of the mobs outside the Virginia State Penitentiary (and outside other penitentiaries) at the execution of a black man who has killed a white man are simply the most vivid proof that racial prejudice is still alive.[6]

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[5] This Court has been able to draw lines when applying the Fourteenth Amendment equal protection guarantees; some forms of discrimination have been treated more harshly than others. Discrimination on the basis of race, for example, has always been subject to strict scrutiny, *See Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969). The same scrutiny has not been applied to cases of discrimination on account of gender. *Reed* v. *Reed*, 404 U.S. 71 (1971); *Kahn* v. *Shevin*, 416 U.S. 351 (1974).

[6] Respondent has suggested that the "Fry, Nigger, Fry" chants and the mobs waving nooses and Confederate flags outside the Virginia State Penitentiary mobs outside the Virginia State Penitentiary

B. Applying The Case-By-Case Analysis Of *Ristaino* v. *Ross*, The Facts Known To The Trial Judge At The Time Of Trial Were Sufficient To Require Inquiry Into Possible Racial Prejudice.

Respondent has argued that the factors mentioned in our Opening Brief supporting our claim were not known to the trial judge at the time of trial, and therefore the failure to ask the questions could not be regarded as an abuse of discretion. Brief of Respondent 13.

In fact, the trial judge knew that this was a black-on-white crime, that inflammatory pretrial publicity had required a change of venue to a distant county with which neither counsel nor the court was familiar, that counsel was not going to be permitted to participate in *voir dire* and that the scope of the *voir dire* would be extremely limited[7] and the number of

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when Linwood Briley and James Briley were executed were somehow unique to their cases. Brief of Respondent 21. When Morris Mason was executed on June 25, 1985, the crowd was smaller, but the same mob gathered. One woman carried a sign that read "Fry like bacon. Koon. Burn damn you." "Mason is executed 'with best of dignity'", Richmond News Leader 1 (June 26, 1985); "Last appeals fail; Mason executed," Richmond Times-Dispatch A-5 (June 26, 1985). The difference between the Briley mobs and the Mason mob was a difference in degree only. All three mobs illustrate the undeniable fact that there are people in Virginia who believe that the death penalty is particularly appropriate for blacks who have killed whites. All that we ask of this Court is that we be permitted to find out if any of those people were on our jury panel.

[7] Counsel for Respondent claims that Petitioner has misstated the length of the *voir dire*. Respondent has asserted that it took "in excess of 2½ hours." Brief of Respondent 19-20. In fact, *voir dire* began at 11:15 a.m. (Transcript of December 3, 1979 at 40), and the *voir dire* concluded at 1:15 p.m., at which time the court took a brief recess to allow counsel to think about their strikes (Transcript of December 3, 1979, at 99.) The court reconvened at 1:30 p.m., and the strikes were made; the court then recessed at 1:50 p.m. (Transcript at 102.) Of course, since the trial involved individual *voir dire*, much of

peremptory challenges small. In addition, Judge Godwin was surely familiar with the facts of the case, at least in broad outline, from having reviewed the press clippings on the change of venue motion and having ordered a psychiatric examination of Petitioner at state expense. He was also probably familiar with at least the broad outlines of the evidence concerning discriminatory application of the death penalty in the past,[8] though he apparently regarded such evidence as irrelevant.

Many of the other factors—the facts that Virginia allows the fewest peremptory challenges of any state in the Union, that statistical evidence indicates that mid-range cases such as these show the most pronounced effects of racial prejudice, that a jury recommendation of death is virtually conclusive, and that the Virginia Supreme Court has never found a death sentence to have been imposed under passion or prejudice—are directed primarily to an appellate court, to refute sugges-

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the time was wasted as jurors came and went, the judge repeated the preliminary questions, and counsel argued motions to exclude for cause. It makes little difference whether the figure is 2 hours or 2½ hours; the *voir dire* was short and was of neither the duration nor the breadth of even the *voir dire* in *Ristaino* v. *Ross*, 424 U.S. 589 (1976), or *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981).

[8] Judge Godwin had the Bowers and Pierce study (Bowers and Pierce, "Preliminay Tabulations Reflecting Arbitrariness and Discrimination under Post-*Furman* Capital Statutes" (1979) (Defendant's Exhibit One) (App. 44-69)) in front of him already. It also seems likely that he, having practiced law in Virginia and having been a judge in Virginia for many years, would be aware of the general factual outlines of this claim, particularly after *Furman* v. *Georgia*, 408 U.S. 238 (1972). In saying this, we do not contend that Judge Godwin knew specifically that 87% (202 of 236) of those executed in Virginia between 1908 and 1962 were black, *see* Note, "Capital Punishment in Virginia," 58 *Va. L. Rev.* 97-142 (1972), but he surely was aware of the general basis for counsel's concern about racial prejudice and discrimination.

tions that the error was harmless or that Virginia's post-*Gregg* statutes adequately protect against passion and prejudice.

Knowing what he did about the case, Judge Godwin should have permitted *voir dire* on racial attitudes.

III. RESPONDENT'S TREATMENT OF THE EVIDENCE OF HISTORICAL DISCRIMINATION REFLECTS A FUNDAMENTAL MISUNDERSTANDING BOTH OF THE EVIDENCE ITSELF AND OF THE PURPOSE FOR WHICH IT IS OFFERED.

Respondent's attacks on the Gross-Mauro study[9] miss the point of why the study was referred to in this argument at all. Respondent dismisses Petitioner's evidence of the historical discrimination in the imposition of the death sentence with the following argument:

> At a minimum this Court's decisions in *Gregg*, *Proffitt* [v. *Florida*, 428 U.S. 242 (1976)] and *Jurek* [v. *Texas*, 428 U.S. 262 (1976)] stand for the proposition that states may separate themselves from historical backgrounds concerning capital punishment by the enactment of statutory schemes which provide focused attention on the particular defendant and his crime. Since 1977, Virginia has been proceeding under such a constitutional scheme and must be judged upon the manner in which the death penalty is presently being imposed rather than upon what may have occured in the distant past.

Brief of Respondent 17.

If Respondent's argument is that the enactment of a post-*Gregg* scheme means that an Eighth Amendment claim of discriminatory application must start with new statistics, accumulated beginning with the passage of the new statute, Respondent is certainly correct. We are not arguing that the

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[9] Gross and Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization* (unpublished study) (October, 1983) (App. 33), now published with only minor revisions at 37 *Stan. L. Rev.* 27 (1984).

entire statute must be stricken, or that it is impossible ever to apply fairly a death penalty statute.

We accept this Court's decisions in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), and subsequent cases, holding that the death sentence may be imposed if procedural protections are enacted to eliminate passion and prejudice.[10] We have offered these statistics, therefore, not to assail the structure of the statute, but to illustrate human nature. Statutes vary from state to state; people do not. Statutes may change with the stroke of a pen; changes in social attitudes may require a generation or more to complete.

Jury decision-making is a function of law and of juror psychology. The pre-*Furman* statutes were facially neutral as to race, so the discriminatory impact must necessarily reflect a discriminatory psychology. Though the death penalty statutes before *Furman* did not adequately channel the juries' discretion, it was not the statutes that caused blacks to be executed more often than whites before 1972—it was the jurors. It was not the unitary jury trial that sentenced to death those who killed whites more often than those who killed blacks—it was the jurors.

Gregg, *Proffitt* and *Jurek* state that it is possible to enact and enforce a death penalty statute in a non-discriminatory manner, but both those cases and subsequent cases (*see, e.g.*, *Godfrey* v. *Georgia*, 446 U.S. 420 (1980)) make it clear that the States can only apply such statutes if adequate care is taken to

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[10] The dissenters in *Furman*, led by Justice Powell, believed that the statistics were distorted by many death sentences imposed when blacks were kept off juries, and before other constitutional protections were extended to even the odds. But even the dissenters would presumably agree that the pre-1972 data shows that a judicial system that leaves to the unfettered discretion of whites the decision of when blacks should die will result in a disproportionate number of blacks being sentenced to death.

guard against passion and prejudice. That protection begins with thorough *voir dire*.

This Court cannot by judical fiat change the hearts and minds of two hundred million Americans. Perhaps many years from now this Court may determine that years of non-discriminatory application support the conclusion that our society has changed—that racial prejudice no longer influences the decisions about who dies. But this Court cannot assume that the discrimination that so troubled it in 1972 had vanished by 1979.[11]

Because we are not claiming that Virginia's post-*Gregg* statute has been discriminatorily applied, but rather only that people subject to being called as jurors may harbor racial prejudices that will directly affect their ability to decide punishment fairly, the fact that we have no compelling data with statistical significance establishing discriminatory application of the Virginia statute is not fatal. All that we have ever tried to suggest is that racial prejudice still lingers, that that prejudice manifests itself in capital cases, and that Virgi-

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[11] We have acknowledged that the racial climate in this country has generally moderated in the last generation, particularly in the South. Perhaps the single most important force for moderation has been the desegregation of public schools pursuant to this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Respondent cites our admission of this moderation as being an indication that the discrimination which we seek to eliminate from our juries is not in fact present.

Of the twelve jurors, only three are of such an age as to make it likely that they attended integrated schools. Based on the ages listed in court records for each of the jurors who in fact served, the median age of the jurors is 53.5 years (at time of trial), and only Virginia Ruth Merritt (age 22), Kathy Ellen Bailey (age 21) and James Warren Smith (age 28) would have had any chance in Virginia of attending integrated schools. The moderating influence of an education in integrated schools is unlikely to have made much of an impact on most of the rest of the jurors.

nians are just as human as the citizens of neighboring states.[12] Gross and Mauro's study and Bowers and Pierce's study relate only partly to the statutes in the states studied. The implications of their studies are not legal but sociological.

Respondent criticizes the Gross-Mauro study because:

1. "It utilizes overly general information from which to draw specific findings." Brief of Respondent 32.

2. "The Study lacks statistical validity because it does not adequately compare murders of similar atrocity." *Id.*

3. "The Gross and Mauro study has been rejected by the Fourth Circuit" because the Virginia data presented "are wholly inconclusive," quoting *Linwood Briley* v. *Booker*, 746 F.2d 225, 227 (4th Cir.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 286 (1984). Brief of Respondent 33.

At the outset, it should be noted that the cases cited by Respondent at pages 32-34 of his Brief either did not involve the Gross and Mauro study or did not include an evidentiary hearing at which the Gross and Mauro study could be properly and fairly subjected to scrutiny. We made a proffer to the United States District Court which was never countered with either facts or expert analysis. Respondent, having opposed efforts to have an evidentiary hearing on the question of discriminatory application, has no expert analysis in the record on which to base his attacks on the Gross-Mauro study, and he cannot remedy the lack of record support for his assertions by quoting the criticisms of other courts of other studies.

In any event, those criticisms are unfounded. Respondent's first complaint is that Gross and Mauro looked at

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[12] We had sought any evidentiary hearing at which we might offer testimony from psychologists and sociologists that would indicate that the patterns of behavior of Virginians do not differ significantly from the patterns of behavior of citizens of other states, but that request for a hearing was denied.

> all homicides, not just those for which capital punishment is statutorily authorized. . . . The Study, therefore, is comparing capital murders with deaths from motor vehicle accidents, family disputes and the like.

Brief of Respondent 32. This point has superficial appeal, but it is relevant only if the deficiency in the scope of the sample was itself responsible for the statistical disparity.

One of the assumptions that one must make before the Gross-Mauro study is to be used in the death penalty debate is that the ratio of death-eligible crimes to all crimes studied will be essentially the same for a given combination of race of suspect and race of victim. There is no reason to believe that this assumption is not valid.

Respondent's objection can only be found to have merit if it can be shown that the figures applicable to death-eligible cases show essentially equal chances of receiving the death sentence for the various combinations of race of victim and race of suspect, and therefore that the disparity found over a sample that contains both death-eligible and non-death-eligible cases (motor vehicle accidents, family disputes, second degree murders, barroom brawls, murders in the course of a burglary, murders in which the robbery was not consummated, etc.) is explained by disparities in the non-death-eligible class. To explain the disparities while assuming a fair application of the death sentence, it would be necessary to show that:

—few blacks kill whites in non-death-eligible situations;

—most whites kill whites in non-death-eligible situations;

—most blacks kill blacks in non-death-eligible situations;

—all whites who kill blacks do so in non-death-eligible situations.

There is, of course, no such evidence in the record, and it is not the sort of topic on which this Court should speculate.

Respondent is simply wrong in stating that the study of Dr. Raymond Paternoster, "Race of Victim and Location of Crime:

The Decision to Seek the Death Penalty in South Carolina," 74 *J. Crim. L. & Criminology* 754 (1983), included non-death-eligible cases. In fact, Dr. Paternoster was very careful in selecting his sample:

> Rather than examine the decision to seek a death sentence using the total pool of all homicide cases, the analysis will focus primarily on statutorily defined "death eligible" cases.

Id. at 765. *See also* Note, "Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-*Furman* Murder Cases in Dade County, Florida, 1973-1976," 33 *Stan. L. Rev.* 75 (1980). Dr. Paternoster's study was limited to "death-eligible" cases, and his conclusions were the same as those rendered by Gross and Mauro.

Respondent's second criticism of the Gross-Mauro study is that "it does not adequately compare murders of similar atrocity." Respondent here cites *Shaw* v. *Martin*, 733 F.2d 304, 312 (4th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 555 (1984), but Respondent does not tell this Court that the criticism of the Fourth Circuit was directed towards Paternoster's study, not Gross and Mauro's study. The Gross-Mauro study did attempt to control for "three major legitimate predictor variables": whether there was an accompanying felony, the relationship of the suspect to the victim, and the number of victims. 37 *Stan. L. Rev.* at 75. Comparing those aggravating factors, and comparing comparable cases, Gross and Mauro found that the racially discriminatory disparities remained. *Id.* at 95. The failure of the study to separate out cases of murder in the commission of a burglary (not a capital offense in Virginia), *see* Brief of Respondent at 32-33, is likely to be irrelevant unless there is some reason to believe that blacks who commit murder in the course of a burglary are less likely to kill whites than other combinations of victim and suspect.

Obviously, Gross and Mauro cannot control for the amount of blood on the floor or the number of shots fired, but such individual case features either even out or fade into insignifi-

cance in a large statistical sample. On the average, a white probably bleeds about as much if shot by a white as if shot by a black, and one might also suspect that, on average, the number of shots fired when a black kills a white is likely to be the same as when the killing is done by a white.

The study does not compare "murders of similar atrocity" with figures kept separately for one gunshot, for two gunshots, and so on, but then the entire point of the Gross-Mauro study was to go beyond case-by-case comparisons and to evaluate the statistics from across the country, assuming, as social scientists must always do, that if the size of the sample is large enough, there will be "murders of similar atrocity" in the different categories of race of victim and race of suspect. Unless there is some indication that blacks are more likely to commit atrocious murders against whites, and that whites never commit atrocious murders against blacks, Respondent's objection cannot explain the statistical disparities, and cannot affect the validity of the study's conclusion.

It is precisely this concern that a statistical study must have a large number of cases to draw from before it becomes statistically significant that causes the authors of the study to be cautious about inferring too much from the Virginia data. They acknowledge that the Virginia data is insufficient to allow an independent conclusion that the Virginia death penalty is being discriminatorily applied. However, the authors say, Virginia must be looked at in conjunction with the other states.

> Some of the racial disparities that we report would not, on their own, constitute convincing proof of racial discrimination; this is particularly true for Arkansas and Virginia, in each of which we study fewer than twenty death sentences. If we were examining the data from one of the states separately from the rest we would conclude that there is good reason to *suspect* racial discrimination in capital sentencing—*indeed, that it is more likely than not*—but that it is too early to tell for sure. But we are not considering these states in isolation, and we are not primarily interested in determining the existence of racial discrimination in any particular state.

App. 34-35 (emphasis added).

We will acknowledge, as we have acknowledged at every step of the way, that the Virginia statistics from the Gross-Mauro study are not sufficient to provide a basis for overturning the statute as being discriminatorally applied. That is not the claim before this Court, however. The state-by-state analysis may be important to discriminatory application claism, because some state's statutes may do a better job of screening racial discriminatory prosecutions, or because appellate review in one state may be more careful than in another state. However, where our claim deals only with human nature, and not with statutes, the cross-state comparisons are valid.

IV. THE PRESENCE OF BLACKS ON THE JURY, EVEN IF THE AFFIDAVIT OF CLYDE GIBB MAY BE CONSIDERED BY THIS COURT, IS NO GUARANTEE THAT THERE WAS NO PREJUDICE IN THE JURY ROOM.

Respondent has attached to his Brief an "Addendum" consisting of the *ex parte*, extra-record affidavit of Clyde Gibb, Clerk of the Circuit Court for Northampton County, concerning the racial makeup of the jury. That affidavit is the subject of a motion to strike, filed contemporaneously herewith. The impropriety of that action is dealt with in that motion, and that point will not be reargued. However, the suggestion (Brief of Respondent 19, 21) that the presence of blacks on the jury guaranteed that there would be no prejudice is illogical.

A criminal defendant is entitled by the Sixth and Fourteenth Amendments to the United States Constitution to have twelve unbiased jurors. As this Court noted in *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966), "Petitioner was entitled to be tried by twelve, not nine or ten, impartial and unprejudiced jurors." *See also Davis* v. *Georgia*, 429 U.S. 122 (1976). The fact that four of the twelve jurors were of the same race as the defendant is

hardly a substitute for *voir dire* sufficient to determine whether the veniremen were in fact biased.

This Court has expressly refused to presume, as Respondent asks this Court to do, that the presence of blacks in the jury room will or did prevent racial prejudice from being a factor in the decision to ignore death. In *Castaneda* v. *Partida*, 430 U.S. 482, 499 (1977), this Court rejected the argument that a *prima facie* case of discrimination against Mexican-Americans in grand jury selection is rebutted solely by showing that Mexican-Americans govern the county in question.

> Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group. Indeed, even the dissent of Mr. Justice Powell does not suggest that such a presumption would be appropriate. . . . The problem is a complex one, about which widely differing views can be held, and, as such, it would be somewhat precipitate to take judicial notice of one view over another on the basis of a record as barren as this.

As Justice Marshall noted,

> Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.

Id. at 503 (Marshall, J., concurring). Justice Powell's dissent, joined by the Chief Justice and Justice Rehnquist, was clearly limited to the specific facts of Hidalgo County, and the dissent did not "suggest that persons in positions of power can never be shown to have discriminated against other members of the same ethnic or racial group." *Id.* at 514 n.6 (Powell, J., dissenting).

If this Court will not make a presumption of fairness where the group claiming discrimination is in a majority, surely it is inappropriate to make a presumption of fairness where only 33% of the jurors are minority group members.

Of course, what Respondent is asking this Court to do is to speculate about what went on in the jury room. Efforts to call the jurors as witnesses to provide direct evidence about whether racial prejudice affected their deliberations would clearly be impermissible. *McDonald* v. *Pless*, 238 U.S. 264 (1915); *see* Federal Rule of Evidence 606(b). If direct evidence of the jurors' deliberations is impermissible, it is difficult to see why it should be permissible to introduce circumstantial evidence, which can only be made relevant if this Court indulges in wild speculation to take judicial notice of demonstrably false assumptions of human behavior. If the Respondent is truly serious about having this case turn on an effort to discern the actual thought processes in the jury room, the record is simply inadequate. This Court has refused to take judicial notice of the psychology of discrimination, *Castaneda*, *supra*, at 499, and the social science evidence appears to indicate that Respondent's assumption is in fact incorrect. *See* G. Allport, *The Nature of Prejudice* 150-153 (1954), and other sources cited at *Castaneda*, *supra*, at 503 nn.2, 3 (Marshall, J., concurring).

As we have stated in our motion to strike, we are prepared to prove, if this Court deems it relevant, that the four blacks on the jury consisted of one 21-year old woman of unknown occupation, one farm laborer, one Highway Department laborer, and an elementary school principal. If we are to speculate about the internal dynamics in the jury room, this speculation should include the likelihood that the first three blacks mentioned would not play a forceful part in the deliberations, whereas the last mentioned, Mr. Worsley, the foreman of the jury, might well be a black who has "achieved some measure of economic or political success" and has thereby "gained some acceptability among the dominant group." *Castaneda*, *supra*, at 503 (Marshall, J., concurring). Such a minority member may

discriminate against a black, in an effort to curry favor with the dominant group.

To get away from the factual muddle and to return to the law as enunciated by this Court, Willie Turner "was entitled to be tried by twelve, not nine or ten, impartial and unprejudiced jurors." *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966).[13] Even if we accept the scientifically dubious proposition that blacks would not discriminate against other blacks, Respondent is in effect saying that Willie Turner had a right only to four impartial jurors. That is not the law of this land.

CONCLUSION

Willie Turner had a right to twelve impartial jurors, and he had a right to reasonable *voir dire* to secure that impartial jury. Those rights were denied him in his capital sentencing trial.

Petitioner prays this Court to reverse his death sentence and to return the case to the Circuit Court for the County of Southampton for a new sentencing hearing or a new trial for Willie Turner.

Respectfully submitted,

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[13] This is particularly true in a capital case in Virginia, where one juror holding out for life imprisonment means that the Defendant is sentenced to life imprisonment. In a capital case in Virginia, a non-unanimous decision *is* a verdict of life.